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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 325

A. P. HUDSON and H. ISAIAH SMITH, Special Receivers of Fidelity Assurance Association Appointed by the Circuit Court of Kanawha County, West Virginia, and FIDELITY ASSURANCE ASSOCIATION, a Corporation,

Petitioners,

VS.

H. E. GRANT, L. H. BROOKS, Trustee, ELBRIDGE W. PALMER and R. L. MALONEY, Tennessee Resident Contract Holders of Fidelity Assurance Association,

Respondents.

REPLY BRIEF

Several points raised by respondent H. E. Grant require a brief answer.

Grant Made No Legal Appearance and Was Never Made Party in Case

On page 7, under "Summary of Argument," Point A, it is stated that Grant appeared in court on numerous occasions, and he filed proofs of claim, and he was further a party because he was a contract holder, and as such a defendant in the general creditors suit.

In proceedings such as this, where there is an apparent disagreement between counsel, the record is and should be the best proof.

Counsel for petitioners never at any time during all of the times they were in the Chancery or trial court saw respondent Grant, nor his counsel, nor knew of their being in the case, until several months after Grant had appealed.

The record in this case positively shows that Grant made no legal appearance in person or by counsel until the 29th of January, 1944.

In our main brief (page 48) there is cited definite authorities to the effect that the mere filing of a claim does not make one party to a proceeding, nor does the fact that he is a claimant, and as such sued generally with all other claimants, make him a party, unless process is served upon him, or unless and until he enters a legal appearance in the proceedings. No cases have been cited in opposition to these citations. The authorities petitioners cited are general and include cases from Tennessee and this Court, and therefore we believe that it is conclusive that Grant was not a party to the proceedings.

No Appeal Within Statutory Time Limit

Responding to Point B of "Summary of Argument," on page 8, we refer the Court to pages 42 to 46 of our original brief, and also refer the Court to the brief of respondents *L. H. Brooks, Trustee, et al.*, pages 5 to 14.

The Code of Tennessee definitely states that thirty days is the time limit within which an appeal can be taken from a judgment or decree, and further definitely states that such a decree is interlocutory or final, to be determined by the subject matter. The cases cited definitely hold that "if it settles a principle, adjudges a right, or determines an issue, the decree is final."

Respondents' own brief stated that the decree of December 10, 1943, held that the funds should be distributed among contract holders "on the basis of the surrender values of their contracts," (p. 6); and that decree likewise held that *only* such persons should share in the deposit fund. (R. 51).

Appellate Tennessee Courts Acted Without Jurisdiction.

Therefore, very definitely an issue was settled and rights were adjudicated, and the appeal time was thirty days from the entry of that order, and no appeal was taken by Grant within that time limit.

Petitioners, as do respondents *L. H. Brooks, Trustee, et al.,* therefore contend that the appellate courts were without jurisdiction, under their own laws and decisions, to entertain any appeals, and that having acted in the premises without jurisdiction, such acts were unconstitutional.

That the appellate courts of Tennessee were without jurisdiction is borne out by the fact that petitioners and respondent Brooks, Trustee, deposited the full amount claimed by respondent Grant, and offered, as a nuisance value, to allow judgment in that amount to be entered against them. Thus, any appellate question was moot, and the courts were without jurisdiction.

Federal Questions Early Raised

As it is fully disclosed by the record, these contentions were made throughout the proceedings in the Court of Appeals, by numerous motions, and again in the Supreme Court, the former ruling against petitioners' contentions and the latter affirming the lower court with very little or no comment.

Respondent Grant contends that other constitutional issues were not raised below. Before Grant appeared in the proceedings, petitioners filed a brief with the Chancery Court, and in that brief raised constitutional issues. The Chancellor, in his opinion (R. 52) even discussed the constitutional question, and stated: "Mr. Palmer cites a number of cases in his brief in support of this proposition, • • •," and declared that it was compelled to decide the issues favorable to the contention of the present petitioners because to do otherwise would be unconstitutional, and would be directly opposed to the cases cited in support of the proposition in petitioners' brief, including cases from this Court. (See R. 58).

Grant No Right to Appeal For Class

Petitioners insist that certain cases cited on page 8 sustain the proposition that an appeal by one party sets aside judgment in favor of other parties unappealed from. The cases there cited are copied verbatim from the opinion of the Court of Appeals (R. 103-4), and an examination will show the same incorrect citations were used.

These cases do no more than state that where a principal appeals from a judgment against him and his surety, that the judgment against the surety is stayed pending the determination of the suit on appeal against the principal. The cases are not in point and do not sustain the proposition for which they are cited.

Grant has never yet shown he was a party to the case, and much less has never cited any authority to show how or why he was entitled to represent a class. Petitioners have gone to great trouble to prove Grant, in any event, could never have appeared in the appellate courts for anyone other than himself, and submit that in the ab-

of a contrary showing, their contention is sound, should be sustained.

Finality of Decision Below

e opinion of the Court of Appeals ends with these sentences:

> "For these reasons we think class (2) claimants are equally entitled with class (1) to share pro rata in the fund; and that all these claimants are entitled to share upon the basis of the amounts paid or the cash surrender values, whichever happens to be greater.
>
> "It results that the decree of the chancellor will be modified in the respects above indicated and the cause will be remanded to the chancery court for distribution upon the principle above set forth and for further proceedings not inconsistent with this opinion." (R. 109).

ould anything be more final than this? The Court has mpted to hold that certain definite persons shall share he fund, and has ordered the lower court to make ribution to them.

his was the main part of the opinion appealed from, ourse. The Supreme Court of Tennessee, in its first ion, in the concluding paragraph, stated: "We hold recovery of contract holders of Classes 1 and 2 ld be such as to compensate them as far as possible the loss they have suffered by reason of the insolv- of the Fidelity on a pro-rata basis. * * * We are, refore, of opinion that the Court of Appeals in its l-reasoned opinion correctly interpreted the statutes question. It results that the decree of the Court of peals will be affirmed." (R. 140).

The Supreme Court, in its third opinion (R. 180), ted that a question was presented as to whether the

appeal of Grant would inure to the benefit of other Class 2 certificate holders, and then the Court stated: "It was not deemed necessary to discuss the second question • • • for we thought the disposition made of the second question by the Court of Appeals was justified by the authorities cited in its opinion."

The Court ended its opinion by stating: "As above stated, this cause will again be remanded to the Chancery Court of Davidson County for proceedings not inconsistent with the original opinion filed herein." (R. 182).

Thus, the Tennessee Court has directly held that the funds shall be distributed to all persons resident of Tennessee having Fidelity contracts, with or without cash surrender values, who are not more than a year delinquent in their payments, and sets aside the judgments in favor of the contract holders with cash surrender values, as decreed by the Chancellor.

On remand, the Chancellor stated that he could only determine who the distributees were, and nothing else, and then must distribute in accordance with the Supreme Court's opinion.

Certainly nothing could be a more final judgment. The names of all contract holders, of whatever category, have been a part of the proceedings in Tennessee for many years. The amounts due them under any theory of distribution have been determined for many years. The Master need merely set down those lists of names and the amounts due them, calculated on a pro rata basis, from the data already in his possession. Certainly that is purely an administrative act.

All holdings which affect the rights of petitioners have been definitely and finally adjudicated, and unless this Court will grant relief, the Chancery Court will be re-

quired to make distribution as the Supreme Court directed, and the surplus which petitioners claim belongs to them, is forever gone.

Prejudicial and Unconstitutional Decision Below

May we call the Court's attention to the opinion of the Court of Appeals (R. 104, 108), which are the keys to the incorrectness of the Court's decision. The Court (R. 104) stated:

> "It is true while the Fidelity was able and willing to perform its part of the contract, no contract holder had a right to refund of his payments or to anything but the benefits stipulated in the contract, one of which was that after he had paid as much as 12 monthly payments he could surrender the contract and take its cash surrender value."

At R. 108, the Court stated:

> "The reference (in the statute)* to the company's cash or current contract liability was merely for the purpose of fixing the minimum of the amount of the deposit required and not for the purpose of limiting the class of beneficiaries of the deposit. It is true no contract holder could resort to the deposit as long as the company was solvent; * * *."

Thus, we think the situation is made clear. The deposit required was the issuer's cash liability which was definitely set up in the contract. (R. 15). Under the terms of the contract (R. 15), the company did not owe any amount in cash to the contract holder until "after 12 or more monthly payments thereon have been made" (See Sec. 13 [R. 15]).

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*Code, Sec. 6057, required that investment companies such as Fidelity should maintain a deposit "at no time less than 100% of the issuer's cash or current contract liability on all such outstanding investment contracts."

Therefore, although the Court states that prior to insolvency, the amount of the fund was fixed by the amount the company owed on its cash surrender liabilities, and cash surrender value contract holders could have cashed their contracts and exhaused the entire fund, and non-cash surrender value contract holders had no right to the deposit fund, yet, as soon as insolvency ensued, the cash surrender value contract holders could not receive their full amount back, but the fund must immediately be shared with persons who did not have cash surrender values to their contracts and had theretofore no right in the fund.

It seems to us that the Legislature set up a protective device requiring the deposit of a fund to protect the amount the company owed in cash to resident creditors, and yet the Supreme Court of Tennessee attempts to rule that the Legislature meant that as soon as the company became insolvent, which would naturally be the time at which the protection would be of most value, the fund no longer protects these people, but instead protects an additional group, thereby depriving the first group, unconstitutionally, of some of their property, without due process of law, and likewise, unconstitutionally, thereby depriving petitioners of the surplus of the deposit fund, also without due process of law.

It further seems strange to us that fourteen state courts and all of the fifty thousand contract holders who applied to those courts for repayment of their Fidelity claims, saw this point exactly; and when each of the fourteen state courts decided that the fund was deposited for the sole benefit of cash surrender value contract holders, not a single person appealed therefrom; while in Tennessee only one contract holder, being therefore the only one in the United States, believed this strange interpretation should be placed upon the statute, and the ap-

pellate courts of Tennessee stand alone in making a decision to this effect.

Further Reply to Respondents' Contentions

It is true that in the Supreme Court of Tennessee petitioners there, and here, stated that a decision of this question was the "one real substantive question in issue," but the record shows that they raised, in the Chancery Court, in the Court of Appeals, and in the Supreme Court, and on their petitions and briefs on rehearing, and presented to the Court fully for its consideration, the various other questions which have been here raised.

While it can be admitted that Tennessee may have the right to interpret its own statutes as it sees fit, it nevertheless must do so in a constitutional and legal manner, and it may not do so to the detriment and injury of nonresident persons, nor unlawfully deprive persons of their property, and this is exactly the contention which we have heretofore made, and still insist upon.

It is likewise true that a strange proceeding took place in the Supreme Court below. The Supreme Court first handed down on opinion sustaining the judgment of the Court of Appeals. Then, upon petition for rehearing, it handed down a second opinion directly deciding upon certain federal constitutional questions, granted a stay, and set bond to be given pending an application for a writ of certiorari.

Then, upon further application to the Court for a second rehearing, the Court suddenly decided that its second opinion was worthless, and should be withdrawn in its entirety; that no federal question had been involved; that it would not grant a stay of execution, nor set bond, and therefore did everything, it appears to us, possible to prevent this Court from reviewing its actions.

All of this but confirms the contention of petitioners that the Supreme Court of Tennessee is attempting to do that now which it has attempted heretofore to do,—that is, decide cases solely for the benefit of its own residents and against the interests of all non-residents, and to do all that which is possible to stop this Court from reviewing the matter.

See, *Blake* vs. *McClung*, 172 U. S. 39, 43 L. Ed. 432; 176 U. S. 59, 44 L. Ed. 371.

We, therefore, submit that this Court should in the public interest and because of the unconstitutional methods of decision used by the appellate courts of Tennessee in this case, grant the certiorari for which the petition has been filed.

Respectfully submitted,

A. P. Hudson and H. Isaiah Smith,
Special Receivers, etc., Petitioners,
By: Arthur B. Koontz,
Patrick D. Koontz,
J. Campbell Palmer, III.